

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-7010

United States Court of Appeals
For the Second Circuit

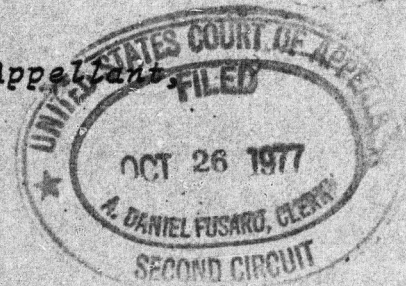
ELLIE MARTELL,

Plaintiff-Appellant

against

CBS, Inc., WCBS AM RADIO
STATION, New York, N.Y.,

Defendants-Appellees.



On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLEES

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UNITED STATES COURT OF APPEALS

For the Second Circuit

ELLIE MARTELL,

Plaintiff-Appellant,

against

CBS, Inc., WCBS AM RADIO
STATION, New York, N.Y.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLEES

Issues Presented

I. Do the allegations of the complaint state a cause of action under Sections 1983 and 1985 of the Civil Rights Act, 42 U.S.C. §§1983, 1985?

II. Is an action for libel, commenced April 29, 1976,

on the basis of a broadcast which allegedly occurred on April 30, 1971, time-barred under CPLR §215(3)?

III. Can a private individual maintain a cause of action under the Personal Attack Rule, 47 C.F.R. §73.123(1976).

IV. Is a complaint which poses no Federal Question and which omits facts showing diversity of citizenship between the parties insufficient on its face?

Statement of the Case

A. The Procedural Background

This action was commenced on April 29, 1976 by appellant Ellie Martell, pro se, for alleged deprivations of rights secured her under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution by reason of an alleged broadcast on April 30, 1971 by appellee CBS, Inc. ("CBS").* In her complaint Ms. Martell seeks damages and injunctive and declaratory relief pursuant to the Civil Rights

*Martell incorrectly sued CBS Inc. as: "CBS, Inc.; WCBS AM RADIO STATION, New York, N.Y.," alleging that "WCBS AM RADIO STATION, NEW YORK" is a subsidiary of CBS Inc. (Complaint par.4, reproduced in the Appendix at 2). However, WCBS is a standard broadcast radio station owned and operated by CBS and not a separate entity. (Affidavit of Charles T. Bates, reproduced in the Appendix at 4, p.3). Hereinafter, references to the Appendix will be designated "App." together with the number assigned the particular document in the Table of Contents to the Appendix.

Act, 42 U.S.C. §§1983 and 1985.

On May 24, 1976 CBS made a motion pursuant to Rule 12(b)(1) and (b), F.R. Civ.P., for an Order dismissing the complaint upon the grounds, inter alia, that the gravamen of the complaint was, in fact, a claim for defamation and that the claim was time-barred (App. 4). On June 17, 1976 a hearing on the motion was held in the United States District Court for the Southern District of New York, The Honorable Richard Owen presiding (see App. 6 par. 1). On June 21, 1976 Martell served a Petition for Reconsideration. And, on November 11, 1976 Judge Owen dismissed the complaint ruling that:

"The complaint herein sounds in defamation. . . . The alleged defamation was broadcast in 1971. This action, commenced in 1976, is therefore time-barred. Civil Practice Law and Rules §215 provides for a 1 year statute of limitations in such cases." (App. 8).

On January 10, 1977 Martell appealed to this Court seeking reinstatement of her complaint (see App. 19).*

B. Statement of Facts

Martell alleges that she is a "consumers' consultant, watchdog and advocate" (see App. 2 at par. 2); her particular

*CF. Brief for Appellant at 12-13 wherein she appears to be requesting that this Court make a determination with respect to liability, issue a declaratory judgment requiring CBS to supply her with a transcript of the alleged defamatory broadcast, and award her damages and costs.

field of interest is the public telephone industry (see e.g., App. 2 at pars. 2 and 3; Brief for Appellant at 6).

In substance, Martell claims that she was defamed by CBS' alleged April 30, 1971 broadcast of an Associated Press news release concerning "her organization, the American Telephone Consumers' Council"* (App. 2 at par. 5); see also App. 2 at pars. 3, 4, 12, 16 and the "Wherefore" clause). She asserts that CBS' broadcast about her organization was "false, libelous, slanderous, defamatory and severely damaging to [her] professional reputation" (App. 2 at ~~para.~~ 5 (p. 6), 6; see pars. 3 (p. 3), 9, 12 and 16). She also claims that the broadcast violated her civil rights (App. 2 at par. 1; "Wherefore" clause; App. 6 at par. 18; see also App. 6 at pars. 9 (p. 4) and 12); and, that CBS violated the FCC Personal Attack Rule by failing to broadcast her response to the news release (see App. 2 at par. 12; App. 6 at pars. 9 (p. 3) and 12).**

*Nowhere in the complaint does Martell set forth any facts showing that the alleged defamatory language was broadcast of and concerning her.

**Although Martell uses the technical term interference with contract in describing certain of the alleged wrongs she suffered (App. 6 pars. 6, 7, 9 (p. 3), 9 (p. 4), 10 (p. 4), 11 (p. 5), 13 and 17) it is clear that all she is alleging is that she defaulted on certain of her contractual obligations because the allegedly defamatory broadcast caused her to suffer mental distress and become incapacitated. Brief for Appellant at 6-7, 8.

ARGUMENT

Preliminary Statement

This action was commenced to recover for alleged violations of rights secured by federal statutes and the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Examination of the complaint as well as the other papers submitted by this pro se appellant in support of her action reveals that the claim is one for damages caused by alleged defamation. Accordingly, we respectfully submit that the Memorandum Order of the District Court dismissing the complaint must be affirmed on the ground stated therein:

"The complaint herein sounds in defamation. . . . The alleged defamation was broadcast in 1971. This action, commenced in 1976, is therefore time-barred. Civil Practice Law and Rules §215 provides for a 1 year statute of limitations in such cases. . . ." (App. 8).

POINT I

THE ALLEGATIONS OF THE COMPLAINT DO NOT STATE A CAUSE OF ACTION UNDER §§ 1983 and 1985 OF THE CIVIL RIGHTS ACT

Although Martell grounds her action upon Sections 1983 and 1985 of the Civil Rights Act (Title 42 U.S.C.) the gravamen of the complaint is that she was defamed by CBS (App. 2 at pars. 3, 5, 6, 12, 16 and the "Wherefore" clause).

In any event, the complaint does not, and cannot support a claim for relief under Sections 1983 or 1985. Section 1983 permits civil recovery only against any "person who, under color of . . . [state law] . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws" of the United States. Although it is possible to state a claim against private persons under Section 1985, the complaint must, in effect allege a conspiracy with "some racial, or perhaps otherwise class-based invidiously discriminatory animus" aimed at depriving the complainant "equal enjoyment of rights secured by the law to all." Griffin v. Breckenridge, 403 U.S. 88, 192 (1971).

Here, neither the complaint nor any papers submitted by Martell allege that CBS acted under color of state law to deprive Martell of any rights, privileges or immunities secured by the Constitution or that CBS conspired with others with class-based invidiously discriminatory animus to deprive Martell of rights or privileges. Thus, her complaint, alleging defamation by an individual corporation, cannot support any claim based on 42 U.S.C. §§ 1983 or 1985. Auld v. Mobay Chemical Co., 300 F.Supp. 138 (W.D. Pa. 1969).*

*In Auld v. Mobay Chemical Co., an action which was essentially for defamation, the plaintiff attempted to circumvent the applicable statute of limitations by arguing that he set forth a cause of action couched in the terms of conspiracy to deprive him of his civil rights. The Court ruled that:

"Plaintiff has failed to plead facts which are the bases for any civil rights under the Federal Civil Rights Statutes, 42 U.S.C. §§ 1983 and 1985. The defendants have acted in a private capacity and for private interests and there is no averment that they were cloaked with public authority or acted under color of law." 300 F.Supp. at 141.

More importantly, Martell fails to state a cause of action under the Civil Rights Act because she has no constitutional right at stake in this case. In a recent decision, Paul v. Davis, 424 U.S. 693 (1976), an action under Section 1983, the United States Supreme Court ruled that an action which is essentially for defamation does not involve deprivation of any rights secured by the Fourteenth Amendment, and therefore, does not fall under that section. As Justice Rehnquist stated:

"Violation of local law does not necessarily mean that federal rights have been invaded."
(Quoting Screws v. United States, 325 U.S. 91, 108-109 (1945)). 424 U.S. at 700

* * *

[T]he interest in reputation alone which respondent seeks to vindicate in federal court is quite different from the 'liberty' or 'property' [protected by the Due Process Clause]." 424 U.S. at 711.

Thus, the Federal Court has no jurisdiction over this case under the Civil Rights Act, 42 U.S.C. §§ 1983 and 1985; and appellant's cause of action must be dismissed insofar as it attempts to allege deprivation of her civil rights.

In any event, assuming arguendo, that appellant's claim falls under the Civil Rights Act, this action must still be dismissed under the one-year limitations period provided by New York Civil Practice Law and Rules §215. It is well established that because Sections 1983 and 1985 do not contain periods of limitation the time in which suits thereunder must be brought is determined by the most applicable Statute of Limitations provided by

the state in which the action arose. Johnson v. Dailey, 479 F.2d 86, 88 (8th Cir.), cert. denied, 414 U.S. 1009 (1973); Auld v. Mobay Chemical Co., supra, 300 F.Supp. at 141; Henig v. Odorioso, 385 F.2d 491, 493 (3rd Cir. 1967), cert. denied, 390 U.S. 1016 (1968).

Here, it is clear that the only applicable statute of limitation is the one for defamation, CPLR §215.

POINT II

APPELLANT'S ACTION IS ONE FOR DEFAMATION AND IS THEREFORE TIME- BARRED UNDER CPLR §215 (3)

As Judge Owen ruled, the "complaint herein sounds in defamation . . ." (App. 8). A review of the allegations in the complaint renders this apparent (App. 2 at pars. 3, 5, 6, 12, 16 and the "Wherefore" clause). Thus, for example, Martell alleges that CBS issued a "libelous, slanderous and defamatory broadcast" (par. 3); "the tone of the remarks sounded urgently scandalous [and] highly derogatory" (par. 5); "the remarks sounded libelous, erroneous and severely harmful to me professionally" (par. 5); [re the text of the article upon which the broadcast was allegedly based:] "the allegations and charges and statements made about my organization were absolutely false, libelous, slanderous, defamatory and severely damaging to my professional reputation" (par. 5);

"[t]he story contained such remarks as the 'shady deals' of [my organization]" (par. 5); I informed [the local CBS News Editor] of the likelihood of a libel suit against WCBS AM Radio if he did not immediately tape my response to his erroneous, false, libelous, slanderous, defamatory and severely damaging news story. I offered him the opportunity of mitigating the damages to my reputation and livelihood" (par. 6); "I phoned WCBS back and informed the News Editor that . . . WCBS AM Radio had libeled me" (par. 12); "[t]he Plaintiff has no adequate remedy at law for the deprivation of her property, rights to earn a livelihood, and move freely in the area of her choice to live and work without fear of reprisal and punishment and being held up to public scorn" (par. 16); "[p]laintiff prays for a permanent injunction restraining defendants from further untruthful and damaging remarks about her and her organization . . . including libel, slander and defamation of character"* ("Wherefore" clause).

Accordingly, this action is one for defamation, see e.g., Morrison v. National Broadcasting Co., 19 N.Y.2d 453, 280 N.Y.S.2d 641 (1967), and is governed by CPLR §215(3) which provides that an action for defamation must be commenced within one year from the date of broadcast. See Sorge v. Parade Publications, Inc., 20 A.D.2d 338, 247 N.Y.S.2d 317 (1st Dep't 1964); see

*The sentence concludes: "and unlawful stifling of her civil rights."

also Zuck v. Interstate Publishing Corp., 317 F.2d 727 (2d Cir. 1963).

In determining the appropriate Statute of Limitations for a particular claim, the courts must "look for the reality, and the essence of the action" and must not rely merely on the complainant's description of it. Morrison v. National Broadcasting Co., supra, 19 N.Y.2d at 459, 280 N.Y.S.2d at 644; Noel v. Interboro Mutual Indemnity Ins. Co., 31 A.D.2d 54, 55, 295 N.Y.S.2d 399, 400 (1st Dep't 1968), aff'd, 29 N.Y.2d 743, 326 N.Y.S.2d 396 (1971); Auld v. Mobay Chemical Co., supra, 300 F.Supp. at 141.

Thus, for example in Auld v. Mobay Chemical Co., supra, the plaintiff attempted to avoid the one year period of limitations and invoke the six year period for civil conspiracy. The Court ruled that where the claim is essentially one for defamation, allegations of conspiracy do not render the action one for conspiracy thereby extending the statute of limitations. Moreover, the one-year limitations period cannot be circumvented by labeling the action as one for injurious falsehood or interference with economic relations, Noel v. Interboro Mutual Indemnity Ins. Co., supra; or, intentional wrong, Morrison v. National Broadcasting Co., supra.

Here, Martell attempts to invoke a six-year statute of limitations by redefining her action as one based upon a contractual obligation. (App. 6 at pars. 7, 10 (p. 4)). In support of this approach she relies on Horstein v. General Motors Corp., 391 F.Supp. 1274 (S.D.N.Y. 1975). Brief for Appellant at 1 (Point II). Horstein, however is inapposite.

In Horstein plaintiff sought damages for an automobile manufacturer's negligent failure to affix a vehicle identification plate to plaintiff's automobile. The manufacturer's negligence resulted in plaintiff's arrest and damage to plaintiff's reputation. On a motion to dismiss, the court in Horstein concluded that the most appropriate statute of limitations was that applicable to negligence actions and not the one-year limitations period governing defamation actions. The Horstein court differentiated the case before it from Morrison v. National Broadcasting Co., stating:

"Joseph Horstein is not seeking damages to his reputation exclusively, nor does he claim defendant communicated the idea to the public that he was a criminal. . . . Damage to his reputation was but one of many distinct consequences of the chain of events initially set in motion by defendant's asserted negligence and eventually carried to fruition by the New York City Police Department." 391 F.Supp. at 1278.

Unlike the plaintiff in Horstein, appellant in the instant case bases her cause of action exclusively upon defamatory words allegedly communicated by CBS. Moreover, she seeks damages which stem exclusively from the alleged defamation and not from any independent wrong. Stated succinctly, Martell claims that she has been brought into "public scorn" by the broadcast and that her professional standing has been pecuniarily damaged. Thus, the harm assertedly sustained by appellant falls precisely within

the definition of defamation contained in the Restatement of Torts and relied on by the Court in Morrison v. National Broadcasting Co.:

"A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third parties from dealing or associating with him." Restatement of Torts §559 (1938), 19 N.Y.2d at 458, 280 N.Y.S.2d at 644.

Therefore, the one year limitation period of CPLR §215 applies and this action was barred as of April 29, 1972.

POINT III.

THE COMMUNICATIONS ACT OF 1934 PROVIDES NO BASIS UPON WHICH APPELLANT CAN PREDICATE THIS ACTION

The law is clear that the Communications Act of 1934 affords no basis upon which to predicate any private cause of action. Daly v. Columbia Broadcasting System, Inc., 309 F.2d 83 (7th Cir. 1962); Network Project v. Corporation for Public Broadcasting, 398 F.Supp. 1332 n.7 (D.D.C. 1975); Smothers v. Columbia Broadcasting System, Inc., 351 F.Supp. 622 (C.D.Cal. 1972); Post v. Payton, 323 F.Supp. 799 (E.D.N.Y. 1971); Ackerman v. Columbia Broadcasting System, Inc., 301 F.Supp. 628 (S.D.N.Y. 1969); Gordon v. National Broadcasting Company, 287 F.Supp. 452 (S.D.N.Y. 1968); See also McIntire v. Wm. Penn Broadcasting Co., 151 F.2d 597 (3rd Cir. 1945),

cert. denied, 327 U.S. 779 (1946); Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497 (1st Cir. 1950). A fortiori, the Personal Attack Rule, 47 C.F.R. §73.123 (1976) promulgated by the Federal Communications Commission under that Act, affords no basis upon which appellant Martell may maintain this action for damages to her reputation. See Red Lion Broadcasting Co. v. E.C.C., 395 U.S. 367 (1969); Brandywine-Mainline Radio, Inc. v. Federal Communications Commission, 473 F.2d 16 (D.C.Cir. 1972). As was established by the United States Supreme Court in Scripps-Howard Radio v. Federal Communications Commission, 316 U.S. 4, 14 (1942):

"The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications."

However, even if the Communications Act of 1934 and FCC Rules promulgated thereunder permitted private recovery in an action for libel, Martell could not successfully proceed under the "personal attack" principle because she alleges the broadcast in issue was a news broadcast (App. 2 at pars 5, IV, 47 C.F.R. §73.123(b)(1976))*.

*As amended, the Personal Attack Rule reads in part:
"PERSONAL ATTACK: political editorials:

(b) The provisions of . . . this section shall not be applicable . . . to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs . . .)."

POINT IV

**THERE IS NO BASIS FOR FEDERAL JURISDICTION
SINCE THE COMPLAINT DOES NOT POSE A FEDERAL
QUESTION AND DOES NOT ALLEGE DIVERSITY OF
CITIZENSHIP**

Diversity of citizenship between the parties is indispensable to the jurisdiction of a federal court where jurisdiction is not acquired under a federal statute. 28 U.S.C. §1331; 28 U.S.C. §1332. Thus, inasmuch as Martell fails to state a claim under the Civil Rights Act or the Communications Act of 1934, her complaint which, in effect, is one for defamation, is defective for the additional reason that it fails to allege diversity of citizenship.

The complaint merely alleges that: "[t]he plaintiff is a citizen of the United States who has resided within the jurisdiction of this Court during most of her life" (App. 2 at par. 2) and that "[d]efendants' residence is at 51 West 52 Street, New York, New York, which is the address of its national headquarters". (App. 2 at par. 4). Such allegations are insufficient to support diversity jurisdiction; it must appear from the face of the complaint that 28 U.S.C. §1332 is applicable and that the parties are citizens of different states. See John Birch Society v. National Broadcasting Company, 377 F.2d 194 (2d Cir. 1967). Accordingly, since the federal court is without jurisdiction in an action for libel where there is a failure of diversity of citizenship between the parties, Harms v. Federal Housing Administration,

256 F.Supp. 757, 760 (D.Md. 1966), the complaint must be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

Moreover, since the action is clearly time-barred, supra, POINT II, there is no reason to afford appellant a chance to cure the pleading defect. Cf. John Birch Society v. National Broadcasting Company, supra.

CONCLUSION

For all of the foregoing reasons we respectfully request that the Order of the District Court be affirmed and that appellant's complaint be dismissed.

Respectfully submitted,

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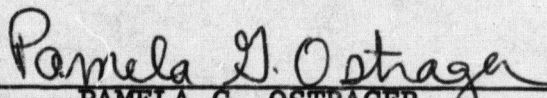
Carleton G. Eldridge, Jr.
Pamela G. Ostrager

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

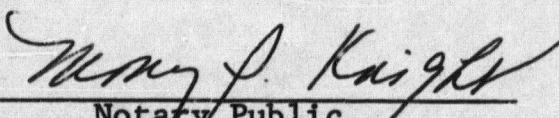
PAMELA G. OSTRAGER, being duly sworn, deposes and
says:

I am over the age of 18 years and reside at 477
F.D.R. Drive, New York, New York 10002.

On the 26th Day of October, 1977, I served
two copies of the within Brief for Appellees upon Ellie
Martell, pro se, by depositing a true copy of the same
securely enclosed in a post-paid wrapper in an official
depository maintained and exclusively controlled by the
United States at 200 Park Avenue, New York, New York 10017
directed to Ms. Martell at 6014 Adams Street, West New York,
New Jersey 07093, that being the address designated by her
for that purpose, or the place where she may reside, between
which places there was then and now is regular communication
by mail.


PAMELA G. OSTRAGER

Sworn to before me this
26th day of October, 1977.


Notary Public
MARY S. KNIGHT
NOTARY PUBLIC, State of New York
No. 2156558
Qualified in Queens County
Term Expires March 30, 1978